

Question Q235

National Group: Dutch Group

Title: Term of copyright protection

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Questions

The purpose of Q235 is to explore the issues raised in relation to Term of protection. The Groups are invited to answer the following questions under their national laws:

I. Analysis of current law

1) Have the Berne Convention amended in 1979 (BC), TRIPS 1994 and the WIPO Copyright Treaty (WCT) been ratified by your countries? Please provide your answer in relation to each individual international instrument, and provide dates and details of ratification.

- WCT: ratified on 14 December 2009, effective date 14 March 2010 (Trb. 2010, 59);
- TRIPs: ratified on 21 December 1994, effective date 1 January 1995 (Trb. 1995, 130);
- Berne Convention: ratified on 9 October 1912, entered into force 1 November 1912, all subsequent acts have been ratified.

2) Have the minimal obligations in respect of Term of protection of copyright imposed by these international instruments been implemented in your countries' laws? By means of which legislation? Please respond in relation to each of RBC, TRIPS and WCT.

- Yes, by means of Articles 37 to 42 of the Dutch Copyright Act.

a) If the answer is no please specify (i) which obligations have not been implemented (ii) give any reasons why this has not proved possible and (iii) whether there are any current proposals for their implementation.

- 3) Do your laws provide for TRIPS + obligations with respect to the Term of protection? Please provide details of any legislation that imposes this, and specify whether it is Domestic or Regional legislation?
- Yes, Articles 37 to 40 of the Dutch Copyright Act (domestic legislation) provide for a term of protection of 70 years post mortem auctoris (or post publication). This term is imposed by Article 1 of EU Directive 93/98/EEC as repealed and replaced by EU Directive 2006/116/EC (regional legislation).
- 4) Have the Terms moved in an upward direction with ensuing revisions of your domestic laws, or as a result of any obligations derived from regional laws? Please provide details. Are there any current proposals for continued increases in Term of protection generally, or in relation to any specified categories of work? Please specify.
- Yes, following the implementation of Directive 93/98/EEC of 29 October 1993 into the Dutch Copyright Act, the terms have moved upwards. Initially the term of copyright protection in the Netherlands was 50 years post mortem auctoris (or post publication). The upward harmonization of the copyright term to 70 years post mortem auctoris (or post publication) by the European legislator required that the terms in the Netherlands be extended. There are currently no proposals for continued increases in the term of copyright protection (although, pursuant to EU Directive 2011/77/EU of 27 September 2011, the Netherlands is obliged to extend the term of protection of related rights in phonograms from 50 to 70 years after publication or communication to the public).
- 5) What is the existing rationale/justification under your laws for the existing Terms of copyright protection? In particular, is the rationale/justification a merely economical one or are other reasons given? Have there been/is there currently, any academic/judicial or general criticism of this rationale? Are you aware of any economical, sociological or other studies justifying or criticizing the current Term?
- The justification for the existing term of copyright protection in the Netherlands is arbitrary. Yet it is clear that it is not based on purely economic rationales. Like in other continental-European countries, copyright law in the Netherlands follows the so-called "droit d'auteur" tradition, in which individual creation and the author's personal stamp are regarded as crucial for copyright protection. As for the term of protection, the idea that follows from this tradition is that, instead of the economic lifespan of the creation, the length of the author's life must be leading when calculating the term of copyright protection. To prevent works created at the end of the author's life from expiring soon after the moment of creation, it was considered fair to provide for a term of protection that exceeds the length of the author's life for a certain number of years. The 50 year-term post mortem auctoris was chosen to ensure that at least two generations of heirs could reap the fruits of the author's creation. One reason for why Directive 93/98/EEC extended the term to 70 years post mortem auctoris was that the average life expectancy in the Community had grown longer. Fixing the term at 70 years was also justified by the desire to provide a high level of protection. Some Member States, including Germany, already applied a 70 year term of copyright protection and the European Commission considered that the rights acquired under the then-existing national laws must not be compromised. Adopting a 70 year-term would also prevent lengthy transition periods that would delay the effective attainment of the internal market.

The Dutch Group observes a growing criticism among content users and particular groups of right holders/authors with regard to copyright. The long term of protection that works enjoy automatically upon their creation creates problems for instance with respect to (i) the protection of cultural heritage, (ii) the creation of digital libraries, and (iii) creative re-use of existing works.

The criticism is inter alia the result of a lack of legal certainty for content users, while the fixed term of protection is irrespective of (a) the wishes and interests of the author and (b) the commercial lifespan of the creation.

a. The result of the current “automatic” system of copyright protection is such that some authors will be granted an extensive, exclusive right to reproduce their creation and will be granted the right to authorise or prohibit any communication to the public of their works by others, whilst they do not necessarily place importance on maintaining the exclusivity granted to them. It may be that authors wish to have their work distributed to the public for no consideration, or at least consent thereto. In these circumstances freedom of information should prevail. One can only benefit from freedom of information in case there is certainty that information is actually free and not covered by any intellectual property right.

b. In other situations authors may wish to obtain only a temporary exclusivity that does not cover a period of 70 years after their death. It may for instance be that the commercial value of a work devaluates in the course of time and that the author has a commercial interest in maintaining his or her copyright for a limited period of e.g. five or ten years only. The limited term for commercially exploiting a work may be due to the nature of the creation (e.g. software products or press releases) or the business strategy chosen by the author/right holder. A creation may lose its commercial attractiveness with the passage of time. Under the circumstances that authors/right holders have no relevant interest in retaining exclusive protection, it would be onerous to prevent others from using their creations.

II. Proposals for harmonisation

Groups are invited to put forward proposals for the adoption of harmonised rules in relation to Term of copyright protection. More specifically, the Groups are invited to answer the following questions:

Introduction to part II – Proposals for harmonisation

Question 235 origins in the political and social questions that are raised on the issue of the term of protection of copyrights. The national groups are asked whether a change of the term of protection should be considered.

The laws of the Netherlands currently provide a term of copyright protection of 70 years post mortem auctoris. As mentioned above, this is in conformity with the harmonized term of protection that is laid down in EU Directive 2006/116/EC.

The Dutch Group is conscious of the fact that the term of copyright protection is governed by international treaties, which have set minimum standards of protection. Said minimum standards of protection do only allow countries to modify the term of protection within a set range. The minimum standard provided by the Berne Convention and TRIPS is 50 years post mortem auctoris. The Dutch Group is

conscious of the fact that a limitation of the term of protection below this minimum standard would be contrary to international obligations and therefore impossible to achieve without amending the international treaties.

Having said that, if the international treaties need to be altered to enable contracting states to adopt a more "adequate" term of copyright protection anyway, then it would not harm to take an open look at how the "optimal" copyright term could be realised and organised best, even if that would require changing other international provisions along the line. One provision that, pursuant to our proposal below, would need change is the prohibition on formalities (Article 5(2) of the Berne Convention as incorporated by reference into the TRIPS Agreement and the WCT).

- 6) In your opinion do the current Terms of copyright protection provide "adequate" standards of protection? Is this protection adequate for all interested parties i.e. authors/commercial providers/consumers? Please give reasons for your answer.
- 7) Do you think that there is a need for an upper limit on Term in international treaties? Please provide your reasons.

Answer to questions 6 and 7

The Dutch Group could have confined itself to contribute to the discussion that it is of the opinion that the current term of protection of 70 years post mortem auctoris is too long and should be restricted to 50 years post mortem, or the other way around, that copyright protection should be everlasting. Nevertheless, such contribution does not fully reflect the Dutch view. The Dutch Group acknowledges that the current term of protection is suitable for a substantial part of creations currently protected under copyright laws. At the same time, however, the copyright system is rather inflexible in that a creation is either protected or not and, if it is, its protection immediately covers the entire duration of copyright. This means that, because of the relatively long copyright term, a number of works that are no longer exploited and for which it is uncertain that the right holders actually desire protection, is locked in the copyright regime until the term expires. It also poses a considerable burden on those who want to further develop certain works, such as computer software, to research copyright protection of the basic materials they want to use. The lack of any form of registration makes this research even more burdensome. That is undesirable. The Dutch Group is of the opinion that an upper limit on the term of protection is needed and could in fact remain as it is, but that the system should be altered so as to allow a more appropriate differentiation of the copyright term according to the anticipated value of the work, as specified below.

- 8) Would you like to see the Terms of copyright protection changed? If yes should the changes take place within the confines of the existing international treaties? Please give your reasons.
- 9) If your answer to 8 is yes and you would like to see the current Term of protection changed, please indicate whether changes should take place in relation to all categories of work, or only in relation to specific categories of work. If only in relation to specific categories of work, please specify which categories of work, and give your reasons for this choice.
- 10) Please list the factors or criteria that should in your view be used to arrive upon the optimum Term of copyright protection for any specific work, or in general. What in your opinions would this optimum Term(s) be?

Answer to question 8, 9 and 10

As explained above, the Dutch Group chose to participate in the discussion with a more far-reaching contribution. The main reason is that it considers the current term of copyright protection to be too inflexible. The term of protection set by international treaties and implemented in national laws is fixed to a term post mortem auctoris and does not provide for the possibility to differentiate between the term of protection in individual cases. If and when a certain creation meets the threshold of copyright protection, the author is granted a fixed term of protection

The Dutch Group is of the opinion that the term of copyright protection should reflect a reasonable balance between conflicting interests of the public in enjoying freedom of information and the author in receiving a reward for the expression of his or her intellectual creations. What term of protection can be regarded as “reasonable” depends on the circumstances of each specific situation such as:

- a. the nature of the creation;
- b. the degree of creativity vested in the creation;
- c. the commercial or emotional value of the work; and
- d. the economic lifespan of the creation.

While the Dutch Group acknowledges that it is impracticable to make an individual assessment for each individual creation, it emphasizes that under the current fixed term of protection it is impossible, to distinguish between different types of creations. In practice, this means that, for some works, the term of protection may be reasonable, but for others, it may not.

In many cases an author will, also depending on the abovementioned circumstances, not have any objection against the work entering the public domain, Therefore it seems appropriate to enable the author to influence the term of protection.

The system proposed by the Dutch Group as specified hereinafter moves away from the fixed term of copyright protection and introduces a system using differentiated terms in which the author has the final say. The result of this system is that the abovementioned elements can be taken into account by the author.

Proposals for harmonisation by the Dutch Group

The Dutch Group envisages a revised copyright system, based on the following principles:

Coming into existence and term of copyright protection:

- A. Copyright comes into existence upon creation of the work;
- B. In order to maintain copyright protection, the copyright must be registered within 20 years after the work was first published;
- C. The registration of the copyright can subsequently be renewed every ten years up to 7 times after the author has passed away. Copyright shall expire not later than 70 post mortem auctoris;

- D. Should the author's successor in title find unpublished and unregistered works of the deceased author, they are entitled to protection provided that they register the copyright within 5 years after the death of the author and subject to the same renewal terms as mentioned under (C) above. If they fail to do so, or – in the situation that the copyright is registered and subsequently renewed – if 70 years have passed since the death of the author, the work becomes part of the public domain;

Enforcing copyright against infringing parties:

- E. In an enforcement action, the copyright owner either has to present a copyright registration, or has to prove that the work was published less than 10 years before the moment of enforcement. The burden of proof rests on the party asserting copyright protection;

The end of copyright protection

- F. If the copyright registration is not renewed, the work becomes part of the public domain;

Registration

- G. In order to make sure that the copyright is recognized globally, the copyright should be registered at WIPO in Geneva (or any other organization);
- H. This register should be available online, with searchable information and rights management information of each registered work;
- I. The registration of the copyright is free. Renewal is however subject to a renewal fee, which should not be prohibitively high and may vary according to specific types of works. The fee progressively increases upon each renewal.

The Dutch Group believes that a balanced and reasonable copyright term may have similarities with the term of protection of other types of intellectual property rights, such as patent rights and trademark rights. The Dutch Group proposes that copyright (as in the current system) comes into existence upon creation of the work, but that, in order to maintain copyright protection, the creation (other than in the current system) needs registration within a specific period of time after creation, and payment of multiannual taxes. The Dutch Group is of the opinion that its proposal should be limited to economic rights, thus excluding the moral rights of the author.

One of the additional advantages of the proposed system is that, depending on the way in which the register operates, it may enhance legal certainty for content users. In the current system it is often unclear who is the author or copyright owner of a particular creation and whether this person is serious about enforcing his or her copyright against third parties. This uncertainty contributes to growing negative feelings in society towards copyrights.

The proposal of the Dutch Group also has its disadvantages. Besides the previously mentioned fact that the proposal is beyond the bounds of what is possible within the range of existing international copyright treaties, the proposed formalities connected with the registration and continuation of copyrights, involve voluminous administrative

proceedings. On the other hand, the internet offers possibilities for establishing an adequate international registration that were of course not existent in the period of time in which the current “automatic” copyright regime was created.

Obviously, the proposed system comes with costs and it is no sinecure to decide by whom these costs shall be borne. This raises questions such as: Should the amount of the multiannual taxes payable by the author be dependent on the size of the registering entity or the commercial value of the creation? Should it be possible to register copyrights in the form of a multiple filing? It is outside the scope of this questionnaire to pursue these questions in greater depth. However, there is some experience with flexibility in taxes in patent law. Recently a set of criteria has been adopted in article 12 of the Unitary Patent Regulation (EU 1257/2012).

The Dutch Group believes that amendments to the term and the conditions for copyright protection may benefit the acceptance of the notion of copyright protection amongst the general public.